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U.S. Citizenship
and Immigration
Services

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FILE:

EAC 03 233 53943

Office: VERMONT SERVICE CENTER

Date: DEC 19 2005

IN RE:


Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and additional reference letters.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer.

(i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

It appears from the record that the petitioner seeks classification as an alien of exceptional ability. This issue is moot, however, because the record establishes that the petitioner holds a Ph.D. in Molecular Biology from Oregon State University. The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We concur with the director that the petitioner works in an area of intrinsic merit, biological research. The director concluded, with little explanation, that the proposed benefits of the petitioner's research would not be national in scope. We withdraw that finding. The record satisfactorily establishes that the *proposed* benefits of his work include improved breeding of livestock and an improved understanding of Leukemia and strokes. We find that such benefits would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

One of the petitioner's references notes that the petitioner was one of five Chinese awarded a travel scholarship to a conference in Canada and that the other four awardees were associate professors while the petitioner was only a lecturer. Formal recognition is one of the regulatory criteria for aliens of exceptional ability. *See* 8 C.F.R. § 204.5(k)(3)(ii)(F). The petitioner also submits evidence of his professional memberships, although no evidence that such memberships are indicative of any influence in the field. Memberships are another regulatory criterion for aliens of exceptional ability. 8 C.F.R. § 204.5(k)(3)(ii)(E). Aliens of exceptional ability is a classification that normally requires a labor certification. We cannot conclude that meeting two, or even the requisite three criteria for that classification warrants a waiver of the labor certification requirement. *See Matter of New York State Dep't of Transp.* 22 I&N Dec. at 222.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this

petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6.

The director concluded that the witness letters did not set the petitioner apart from other researchers and that the petitioner had not demonstrated the significance of his publication record through the submission of citations. On appeal, the petitioner submits additional letters and evidence that his articles published prior to the date of filing have been minimally cited after that date.

The petitioner obtained his Master of Science Degree at the Huazhong Agricultural University in 1989. He then worked as a lecturer there until 1995. The petitioner then studied for his Ph.D. at Oregon State University, which he obtained in 2001. From April 2001 until the date of filing, the petitioner worked as a postdoctoral associate at the Yale University School of Medicine. Up until 2001, the petitioner focused on muscle maximizing in livestock, with implications for human muscle disorders and breast cancer. At Yale University, the petitioner entered new areas of research, focusing on leukemia and hypoxia.

Zhongzhen Peng, a full professor at Huazhong Agricultural University, discusses the petitioner's studies and research at that institution. According to Professor Peng, the petitioner's thesis "was the first systematic study on the adaptation of sheep from low altitude area to high altitude pasture on the southern mountain area of China." The petitioner found that sheep were suitable for the mountain area and would produce a higher yield, but that wool rot would require attention in the humid region. This work led another student to study wool rot.

As a member of the faculty, the petitioner "used quantitative genetics and statistics to study the very complicated optimization of animal breeding and optimized preservation of very important domestic animal breeds." Professor Peng discusses the importance of this work and concludes that the petitioner's papers in this area "give breeding project and preserving project planners some important and practical guide-lines [sic] to obtain maximum project goals, yet not to need [sic] a very big budget."

At Oregon State University, the petitioner worked in the laboratory of Dr. Neil Forsberg. Dr. Forsberg asserts that the petitioner's work "focused on the biology of u-calpain in skeletal muscle." Dr. Forsberg explains that u-calpain has been implicated in muscle-wasting conditions. The petitioner developed an ecdysone-derived skeletal muscle-specific inducible expression system, the first muscle-specific system with an application in living animals. The petitioner's own results from this system apply to any tissue in which tissue-specific expression of a cloned gene is desired. Dr. Forsberg notes that this work was original and asserts that it has "broad-based application." Dr. Hiroyuki Sorimachi, an associate professor at the University of Tokyo, asserts that he intends to use the petitioner's inducible skeletal-muscle specific expression system. On appeal, the petitioner submits letters from Dr. Kevin K.W. Wang, an associate professor at the University of Florida, asserting that his group "will use a similar approach in our future study." Neither individual, however, had already successfully applied the petitioner's work.

According to Dr. Forsberg, the petitioner also discovered "several novel u-calpain substrates including desmin and nebulin," but these results had yet to be published and disseminated to the field as of the date of filing.

On appeal, Dr. Forsberg asserts that the petitioner has "consistently produced significant results on each project on which he has worked." Dr. Forsberg further references the petitioner's "proven ability to produce original research results which impact the research of other scientists in the field." Dr. Forsberg concludes that while "it may be true that all researcher's work leads to one type of finding or another, it is rare for researchers for producing findings that generate excitement and discussion in the field and which impact the work being performed in the field."

The petitioner submitted letters from other researchers focusing on calpain subfamily members. Dr. Masatoshi Maki, a professor at Nagoya University, met the petitioner at the 1999 "Calpain and Human Health" conference. Dr. Maki characterizes the petitioner's work as "very original, creative and important for understanding the physiological function of u-calpain." Dr. Maki discusses the importance of reducing protein degradation of skeletal muscle in meat livestock and asserts that the petitioner "found that over-expression of mutated u-calpain can increase total protein production by 8% in skeletal muscle." The petitioner also demonstrated "that the calpain subunits affect expression of each other," an "important step toward the understanding of protein breakdown in muscle cells." In addition, Dr. Maki explains that some human myopathies result from accumulations of excess proteins such as desmin, which the petitioner demonstrated is a substrate for calpain. Dr. Maki concludes that the petitioner's "break-through discovery might provide a new approach for curing desminopathies," but concedes that the mechanism for calpain's involvement in desminopathy is still unknown. On appeal, the petitioner submits a letter from Dr. John Killefer, an associate professor at the University of Illinois at Urbana-Champaign, indicating that he has cited this work, which he characterizes as "novel" and "well designed."

Finally, Dr. Maki discusses the petitioner's simultaneous work with the hTERT transcription regulatory factor. The petitioner found that new potential factors, such as Int6, bind with the promoter region of human m-calpain. Dr. Maki notes that Int6 is a gene that has been implicated in human breast cancer formation. The petitioner was invited to present this work orally at the "Melatonin and Breast Cancer" conference in San Diego in 2000. Dr. Maki asserts that his own laboratory and others have confirmed the petitioner's results in this area. The record, however, lacks evidence that the petitioner's presentation at this conference has been cited.

Dr. Sorimachi explains that hTERT is not expressed in normal tissue, but is expressed in 90 percent of cancer cases. Dr. Sorimachi asserts that inhibition of hTERT could cure 90 percent of cancers. The record contains no evidence that this work had been published as of the date of filing or has proven influential in the field. Dr. Sorimachi does not claim to be applying the petitioner's hTERT work in his own laboratory.

Dr. Tian Xu, an associate professor at Yale, asserts that the petitioner cloned the transcription regulatory factors of hTERT. Dr. Xu acknowledges that another group devised a method for the same purpose with different results due to utilization of a different cell line, but asserts that the petitioner's method "is more straight forward, simpler and time saving." Dr. Xu also discusses the petitioner's work at Yale that focused on the gene expression of a fruit fly central neuron system exposed to low levels of oxygen (hypoxia) and no oxygen (anoxia), conditions of which fruit flies (*Drosopholia*) are extremely tolerant. Dr. Xu explains that this work has implications for cancer (hypoxia reactions lead to metastasis) and stroke victims. Dr. Xu asserts:

[The petitioner] found (1) the central nervous system responded actively to hypoxia and anoxia stimuli; (2) the central nervous system responded differently to hypoxia and anoxia; (3) about 50 new genes participated in the defense process in [the] central nervous system against

hypoxia- and anoxia- caused injury; (4) increased vitamin A in diet can dramatically increase the tolerance of oxygen deprivation in *Drosopholia*. These findings will lead to a more complete understanding about response of the human central nervous system to stroke. More interestingly, increased amount of Vitamin A in elderly people's diets might prevent the potential damage caused by light stroke which is common in elderly people.

The record, however, lacks evidence that these results are influencing nutritional guidelines by the government or other nutritionist associations.

Dr. Archibald Perkins, an associate professor at Yale University, discusses the petitioner's work relating to leukemia. Dr. Perkins asserts:

[The petitioner] is focusing particularly on a complex genetic locus called *Mds/Evi1*. This locus is clearly involved in myeloid leukemia in both mouse and human, but the mechanism by which it functions in leukemogenesis is unknown. [The petitioner] has taken a strong interest in this problem, and was the prime force in designing the experiments that he is performing. It was his decision to focus on the potential enzymatic activity of MDS/EV11 which is an exciting possibility, based on recent development in this field. We expect that these research effort[s] will constitute an important body of work that will further our understanding of leukemia.

On appeal, Dr. Perkins asserts that the petitioner has now discovered that the "suppression of EV11 levels in leukemic cell lines slows down their proliferation and even causes their differentiation into mature cells that are less dangerous." While Dr. Perkins asserts that this result is "huge," he latter asserts that a breakthrough on MDS/EV11 is "imminent." The record, however, does not establish that this work had produced results with any degree of influence in the field as of the date of filing or even as of appeal. Dr. Perkins fails to identify pharmaceutical companies that have expressed an interest in utilizing these results and the record contains no letters from high-level officials at pharmaceutical companies or federal health agencies confirming the significance of the petitioner's work in this area as of the date of filing.

The petitioner initially submitted his publications and evidence of his presentations of abstracts at various conferences. As noted by the director, the petitioner failed to submit any evidence of the influence of this work, such as evidence of citations. On appeal, the petitioner submits evidence that, after the date of filing, two of his articles published prior to that date have been cited by five independent researchers and one independent researcher, respectively. Thus, even as of the date of appeal, no more than five independent research groups had cited an individual article authored by the petitioner.

Dr. Perkins asserts that the number of citations is significant for a "young investigator," noting that one of his own articles, which has now been cited 72 times, was cited the most times five years after it was published. While the citations for that article may have "peaked" five years after it was published, as noted by Dr. Perkins, the article had already been cited 16 times two years after publication.

The record shows that the petitioner is respected by his colleagues and has made useful contributions in his field of endeavor. It can be argued, however, that most research, in order to receive funding and be accepted for publication, must present some benefit to the general pool of scientific knowledge. It does not follow that

every published researcher producing useful results inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

The petitioner's work with muscle proteins has garnered some attention, especially his expression system, which is the subject of his most cited article. The record, however, suggests that while this system is promising, it has yet to impact the field in a notable way. Moreover, the petitioner no longer works in this area of research. While the petitioner's colleagues see the petitioner's current work with hypoxia and leukemia as promising, the record lacks evidence that, as of the date of filing, his achievements in this area had been disseminated in the field such that we could gauge the impact of that work. The petitioner must establish his eligibility as of the date of filing. See 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In addition to his research activities, the petitioner also coauthored an article on improving undergraduate animal studies programs. Dr. Melvin Yokoyama, a professor at Michigan State University, asserts that this paper "is being used in support of the Michigan State University, Department of Animal Science efforts' to offer a revamped course in international animal agriculture to undergraduate and graduate students and U.S. agribusinesses dealing in international trade."

The petition, however, is not based on the petitioner's future contributions to animal studies programs. Thus, his past work in that area is not necessarily indicative of his impact in his field of genetics.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.